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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 209

CROWELL-COLLIER PUBLISHING COMPANY,
A DELAWARE CORPORATION,

Petitioner,

vs.

MILLARD F. CALDWELL,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Crowell-Collier Publishing Company, the defendant below, respectfully petitions for a writ of certiorari to the United States Circuit Court of Appeals, Fifth Circuit, to review the judgment of that Court entered on April 21, 1947 (R. 38), reversing a judgment of the District Court of the United States for the Northern District of Florida dismissing the complaint in an action for libel upon the ground that it failed to state a cause of action against the petitioner.

Opinions of the Courts Below

The District Court, in holding that the complaint did not state a cause of action against the petitioner, issued a memorandum which is not officially reported, but appears at R. 29.

The opinion of the Circuit Court of Appeals is reported in 161 F. (2d) 333 and appears at R. 32.

A

Summary Statement of Matters Involved

The Complaint

Respondent, Millard F. Caldwell, Governor of the State of Florida, on March 20, 1946 instituted this action in the District Court for the Northern District of Florida against the petitioner, the publisher of the magazine Collier's, basing jurisdiction on diversity of citizenship and the existence of the requisite amount in controversy (R. 3, 4).

The complaint is grounded upon the claim that the publication involved is libelous *per se*. No special damage is alleged.

Respondent alleges, in substance, that he is a citizen of Florida and that petitioner is a corporation organized under the laws of the State of Delaware (R. 3); that petitioner is the publisher and distributor of the national weekly magazine known as Collier's; that in the February 23, 1946 issue of Collier's, which has a circulation of approximately 2,846,052 copies, there appeared on the editorial page thereof the following editorial (R. 5, 6):

> "Two Governors on Race Problems
>
> About a year ago a fourteen-year-old Negro broke into a Wilmington, North Carolina, House, raped a

pregnant woman, was caught next day, confessed and was sentenced to death. Recently Governor Cherry of North Carolina commuted the colored boy to life imprisonment, remarking in part:

'The crimes are revolting, but a part of the blame . . . arises from the neglect of the state and society to provide a better environment . . . Our public schools, equipped with capable teachers . . . (and) an effective compulsory attendance law, would do much to correct delinquency among all races.'

In Florida a few months ago, a Negro under indictment for attempted rape was snatched from jail by a mob and shot to death. Governor Millard Caldwell of Florida said he didn't consider this a lynching. He went on to opine that the mob had saved courts, etc., considerable trouble and added:

'The ordeal of bringing a young and innocent victim of rape into open court and subjecting her to detailed cross-examination could easily be as great an injury as the original crime. This fact probably accounts for a number of killings which might otherwise be avoided.'

Thus Cherry of North Carolina expresses the forward-looking view of these matters, while Caldwell of Florida expresses the old, narrow view which has been about as harmful to Southern white people as to Southern Negroes. We can only congratulate North Carolina on its governor, and hope that Florida may have similar gubernatorial good luck before long."

The publication upon which the action is based has reference to a statement made by the respondent concerning the death of Jesse James Payne, a Negro. The statement was embodied in a letter to Mr. R. B. Eleazer of Nashville, Tennessee, which is as follows (R. 18-20):

"December 28, 1945.

Mr. R. B. Eleazer,
General Board of Education of
Methodist Church,
Methodist Building, 810 Broadway,
Nashville 2, Tennessee.

DEAR MR. ELEAZER:

I have your letter of December 20th. My statement concerning the Payne death was as follows:

'I have examined the reports covering the Jesse James Payne death, and have concluded that the disgraceful occurrence resulted from the stupid inefficiency of the sheriff and not from his abetting or participation.

The Special Grand Jury composed of eighteen qualified citizens of the County, empaneled by Circuit Judge Rowe to inquire into the affair and to make presentment on the questions of responsibility and negligence, reported that there was no negligence on the part of the sheriff and that it, the Grand Jury, was unable to determine the responsibility for the crime.

The special investigator I sent into the county reported that in his opinion the sheriff did not participate in the crime and that he did not intentionally make its commission possible.

A crime of this nature is not essentially local in character. Its significance transcends the borders of both the county and state and draws unfavorable attention to Florida.

Florida and Madison County have suffered a loss of standing in the country as the result of this affair. There was no excuse for it. The efficient administration of justice would have made it impossible, but justice in the state courts of Florida is administered by persons elected by the citizens, and efficiency of that system can be no greater than is the desire for efficiency on the part of the citizenship.

Although Sheriff Davis has in this case proven his unfitness for the office, he was, nevertheless, the choice of the people of Madison County. Stupidity and ineptitude are not sufficient grounds for the removal of an elected official by the Governor.

I want now, however, to serve a note of warning upon officials of Florida that in the future, particularly in cases of this kind, I expect the highest degree of care to be exercised.'

Whether or not the killing of Jesse James Payne was a lynching must depend upon one's definition of that term. My personal opinion is that the crime did not come within any recognized definition of lynching.

It is the duty of a Sheriff to protect his prisoners, not out of sympathy for one guilty of a heinous crime, but in fulfillment of his oath of office and defense of law and order.

The ordeal of bringing a young and innocent victim of rape into open court and subjecting her to detailed cross-examination by defense counsel could easily be as great an injury as the original crime. This fact probably accounts for a number of killings or lynchings which might otherwise be avoided. Society has not found a solution to this problem.

My comment on the case in which you are interested is in line with my policy of holding the citizens of a county responsible for the officials they elect to office. It is my intention to awaken a sense of civic responsibility in our citizens. To that end, I have refused to do their work for them on the theory that when they have found that they must act or take the consequences they will act. Paternalism softens and deadens civic responsibility and it is my intention to stimulate the people to action and make democracy work.

Sincerely,

(S.) MILLARD F. CALDWELL,
Governor."

Respondent alleges that the editorial by direct statement, innuendo and inference, implied that (R. 7):

> "1. 'In Florida a few months ago a Negro under indictment for attempted rape was snatched from jail by a mob and shot to death.' (See Exhibit A for incident referred to. R. 15). The foregoing statement made in the editorial is not true. There is no evidence that the negro was 'snatched from the jail by a mob.'
>
> 2. The editorial after the quotation just above stated that 'Governor Millard Caldwell of Florida said he didn't consider this a lynching.'
>
> The foregoing quotation from the said editorial is not true and is a distortion and misquotation of the statement of the plaintiff, Millard F. Caldwell, that since no mob action was involved he didn't consider the murder of the negro to constitute a lynching.
>
> 3. The said editorial further stated that the said Millard F. Caldwell 'went on to opine that the mob had saved the courts, etc., considerable trouble * * *.'
>
> The foregoing statement as made in the said editorial was not true.
>
> The editorial further stated: 'The ordeal of bringing a young and innocent victim of rape into open court and subjecting her to detailed cross-examination could easily be as great an injury as the original crime. This fact probably accounts for a number of killings which might otherwise be avoided,' which was an isolated excerpt taken from a letter written by the plaintiff, Millard F. Caldwell, on December 28, 1945, to Mr. R. B. Eleazer, General Board of Education of the Methodist Church, Methodist Building, 810 Broadway, Nashville 2, Tennessee. (See Exhibit A for full context of letter—R. 18)."

The respondent alleges, in substance, that prior to the date of the publication of the editorial involved, the petitioner transmitted to various newspapers throughout the United States advance proofs of the foregoing editorial,

calling the attention of the public to the fact that the editorial would be printed; that this publicity increased the damages resulting to the respondent by virtue of the publication, and that the respondent, learning that the editorial was to be printed, notified the petitioner by telegram, dated February 13, 1946, that it contained false, libelous and damaging statements, and that, nevertheless, the petitioner wantonly, wickedly and maliciously caused the editorial to be printed (R. 6, 7).

The respondent alleges that the editorial was published either (1) wickedly and maliciously or (2) as the result of the negligence of the petitioner, intended to, or having the effect of, injuring the respondent in his good name, fame and creed, and bringing him into contempt and ridicule before the people of Florida, and the people of the United States generally (R. 8).

The respondent alleges that he was, before his election as Governor of the State of Florida, by profession an attorney engaged in the general practice of law in Tallahassee, Florida, with clients in "many of the United States of America" (R. 12); that the respondent is now, and was at the time of the publication of the editorial involved, the Governor of the State of Florida; that he had previously represented the people of Florida in the United States Congress and in the Florida Legislature (R. 13).

The respondent further alleges that the editorial involved was calculated to create the impression that he condoned and approved lax law enforcement and lynch law, and that he was thus injured in his personal professional and political affairs (R. 14).

Reference is made in the complaint to a publication in Time Magazine of an article relating to the same subject matter as the editorial involved in this action, and to a subsequent publication in the same magazine of what is de-

scribed as a "correction, retraction and apology" (R. 9-11). It is not alleged, and the fact is, that the petitioner is neither the publisher of, nor has it any responsibility for, publications appearing in Time Magazine.

The complaint concludes with a general claim for damages in the sum of $500,000.00 (R. 14).

Petitioner's Motion

The petitioner moved to dismiss the complaint upon certain specific grounds which included the following, among others (R. 24):

> "It affirmatively appears from the allegations in the complaint that the published statements specifically complained of were true and therefore not actionable.
>
> "It affirmatively appears from the complaint that all discrepancies alleged to exist between the said publication complained of and the language admittedly used by the plaintiff were completely immaterial and that from the complaint as a whole it affirmatively appears that no cause of action arose therefrom for which defendant is responsible in damages to the plaintiff."

District Court Ruling

The District Court, by order dated June 14, 1947, granted petitioner's motion (R. 29). In granting the motion the Court stated:

> "It is the opinion of the Court that the complaint does not state a case of libel per se and that no special damages are alleged to support an action of libel 'per quod.'
>
> "It appears from the complaint that the publication, complained of was privileged."

Opinion of the Circuit Court of Appeals

The opinion of the Circuit Court of Appeals reversing the District Court and ruling that the publication is libelous

per se holds that the editorial involved inferentially disparaged the respondent as a public official, and was, therefore, presumptively actionable.

B

Jurisdiction

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code (28 U. S. C. Sec. 347 (a)).

The decision of the United States Circuit Court of Appeals, Fifth Circuit, was rendered on April 21, 1947 (R. 38). Its order denying petitioner's petition for a rehearing as handed down on June 5, 1947 (R. 43).

C

Constitutional and Statutory Provisions Involved

The constitutional provision involved is the first amendment to the Constitution relating to the freedom of the press and freedom of speech. In addition, the fourteenth amendment to the Constitution of the United States is deemed to be also involved.

The statutory provisions are 770.01 and 770.02, Florida Statutes of 1941, relating to mandatory notice of falsity, the giving of which is a condition precedent to the institution of a suit for libel.

D

Questions Presented

QUESTION 1

Is the doctrine established by the Circuit Court of Appeals in the judgment under review, which restricts the right to comment unfavorably on the official conduct and social views of a public officer, compatible with the Federal constitutional guaranty of a free press?

QUESTION 2

Is one who publishes a statement regarding the political conduct and views of a public officer, when such article does not contain any charge of crime, corruption, gross immorality or gross incompetence, and no special damage results, to be subjected to a recovery of presumed damages as a matter of law?

QUESTION 3

In holding that the publication involved is libelous *per se*, did the Circuit Court of Appeals go counter to the decision of the Supreme Court of Florida that a communication is privileged when made in good faith by one occupying a position where it becomes right in the interests of society to make such communication or publication?

QUESTION 4

In holding that the publication involved is libelous *per se*, did the Circuit Court of Appeals go counter to the decision of the Supreme Court of Florida that a newspaper publisher is not liable for reprinting libelous news items originating and distributed by a licensed news-gathering agency, unless such publication is made with wantonness, recklessness or carelessness, or unless the same is relied upon as a libel *per quod*?

QUESTION 5

When notice of the falsity of an alleged libelous publication is required by state statute as a jurisdictional prerequisite to the institution of a suit for libel, and the obvious purpose therefor is to afford the publisher an opportunity for retraction, which, if made, will absolutely limit the right of recovery to actual damages only, does a purported notice specifying the falsity, but refusing to accept retrac-

tion or apology in satisfaction, and notifying the publisher that final instructions have been given for the institution of suit for damages, meet the requirements of the statute for the institution of such action in which no special damages are alleged or claimed?

E

Reasons Relied On for the Granting of the Writ

1. The decision sought to be reviewed is in direct conflict with the principles stated by this Court in the case of *Baumgartner* v. *United States of America*, 88 L. Ed. 1525, 322 U. S. 665, 674, that:

> "One of the prerogatives of American citizenship is the right to criticize public men and measures—and that means not only informed and responsible criticism but the freedom to speak foolishly and without moderation."

The holding of the United States Circuit Court of Appeals for the Fifth Circuit in this case denies this right, and by such denial invades the freedom of the press and unduly infringes upon the established right to criticize public men and measures.

2. The decision sought to be reviewed is in direct conflict with this Court's holding in the case of *Pennekamp* v. *Florida*, 90 L. Ed. 1295, 328 U. S. 331. It is there stated, in the opinion of Mr. Justice Rutledge, that (p. 371-372):

> "any standard which would require strict accuracy in reporting events factually or in commenting upon them in the press would be an impossible one. Unless the courts and judges are to be put above criticism, no such rule can obtain. There must be some room for misstatement of fact, as well as for misjudgment, if the press and others are to function as critical agen-

> cies in our democracy concerning courts as for all other instruments of government."

The Circuit Court of Appeals failed to apply the foregoing rule, and, on the contrary, ignored it in holding that Collier's publication concerning the official acts of the Governor of Florida resulting in no special damage, nevertheless, subjected the publisher to an action in which recovery of damages would be allowed as a matter of law.

3. The judgment sought to be reviewed is in direct conflict with the rule established by the Supreme Court of Florida in the case of *Layne* v. *Tribune Co.,* 108 Fla. 177, 146 So. 234, that a newspaper publisher is not liable in an action for damages for the republication of a news item emanating from a news-gathering source, unless it is shown that the publication was wantonly, recklessly or carelessly made, or unless the same be counted upon as a libel *per quod.*

4. The decision sought to be reviewed is in direct conflict with the holdings of the Supreme Court of Florida in the cases of *Coogler* v. *Rhodes,* 38 Fla. 240, 21 So. 109, and *Leonard* v. *Wilson,* 150 Fla. 503, 8 So. (2d) 12, to the effect that:

> "Where a person is so situated that it becomes right, in the interest of society, that he should tell to a third person certain facts, then, if he, bona fide, and without malice, does tell them, it is a privileged communication." (*Coogler* v. *Rhodes, supra.*)

5. The decision of the United States Circuit Court of Appeals sought to be reviewed is in direct conflict with the decision of the United States Circuit Court of Appeals for the District of Columbia in the case of *Sweeney* v. *Patterson,* 128 F. (2d) 457, which holds that:

> "It is not actionable to publish erroneous and injurious statements of fact and injurious comment or

> opinion regarding political conduct and views of public officials, so long as no charge of crime, corruption, gross immorality or gross incompetence is made and no special damage results. Such a publication is not 'libelous per se'."

The decision sought to be reviewed is in conflict with the above holding and establishes a new, different and dangerous rule holding that such a publication is libelous *per se* and actionable when it concerns the public conduct and views of public officials.

6. The decision sought to be reviewed overrules the well-established principle that a publication is not libelous unless in the case of a public officer it touches him in his office and has a tendency to injure him therein by an accusation which would show him unworthy of public trust and a betrayer of civil confidence, which is so aptly stated in the case of *Hills* v. *Press Co.*, 202 N. Y. S. 678, holding that in order for a statement to be libelous the publication must:

> "in the case of a public officer, touch him in his office and have a tendency to injure him therein by an accusation, which would show him unworthy of public trust and a betrayer of civil confidence."

Said decision also overrules the long-established principle that when a publication relates to a person as an officer:

> "the better opinion seems to be that to make it actionable *per se* the charge must be of such a nature that, if true, it would be cause for his removal from office."
> *Cotulla* v. *Kerr*, 77 Tex. 89, 11 S. W. 1058.

Such decision further nullifies the principle of law permitting fair comment and the right to criticize one who holds public office, which principle is clearly set forth in

Tanzer v. *Crowley Publishing Corporation*, 268 N. Y. S. 620, to the effect that such criticism:

> "may be captious, ill-timed and without foundation in fact; but, outside of a clear charge of corruption or gross incompetence holding one up to disgrace and contumely, there is no libel."

The foregoing decisions are illustrative of the general principles applicable to publications concerning public acts of officials. The decision in the present case is in direct conflict with these holdings.

7. The decision sought to be reviewed misconstrued Sections 770.01 and 770.02 Florida Statutes, 1941, which provide that as a condition precedent to the right to institute an action for libel, the person who considers himself libeled must give notice of the publication alleged to be false to the publisher, so that the publisher may, within ten days after such notice, publish a retraction, in which event the aggrieved party is limited to the recovery of actual damages only. The Circuit Court of Appeals held that the respondent had complied with these statutes. In the instant suit, no special damages were alleged by respondent, and in his alleged notice to the petitioner he refused to accept any retraction or apology in satisfaction and he advised that one would not be accepted and that directions had been issued to his attorneys to institute the present action. Under the statute, a retraction would have satisfied the damages sued for by the respondent, since he has not alleged or claimed any special damages. The purported notice was, accordingly, not the notice required by the Florida Statute, because by its terms it was contrary to the purpose or requirement thereof. The opportunity of the petitioner to make a retraction afforded by the statute was completely nullified by the notice. In the case of *Tademy* v. *Scott*, 157

F. (2d) 826, the Circuit Court of Appeals for the Fifth Circuit held that dismissal of an action for libel is mandatory when jurisdictional notice of falsity of a publication required by State statute almost identical to the statute here involved was not given as required thereby.

The Circuit Court of Appeals erred in failing to apply here the same rule and principle which it had previously applied in connection with the case cited.

WHEREFORE, your petitioner prays that a writ of certiorari be issued under the seal of this Court, directed to the United States Circuit Court of Appeals, Fifth Circuit, and that this cause may be reviewed and determined by this Court; that the judgment of the Circuit Court of Appeals be reversed by this Court, and for such other and further relief as to this Court may seem proper.

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APPENDIX "A"

Constitutional Provision Involved

The First Amendment to the Constitution of the United States provides that:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Statutory Provisions Involved

Sections 770.01 and 770.02, Florida Statutes 1941, provide as follows:

> "770.01. Notice condition precedent to action or prosecution for libel.
>
> Before any civil action is brought for publication, in a newspaper or periodical, of a libel, the plaintiff shall, at least five days before instituting such action, serve notice in writing on defendant, specifying the article, and the statements therein, which he alleges to be false and defamatory."

> "770.02. Correction, apology or retraction by newspaper.
>
> If it appears upon the trial that said article was published in good faith, that its falsity was due to an honest mistake of the facts, and that there were reasonable grounds for believing that the statements in said article were true, and that within ten days after the service of said notice a full and fair correction, apology and retraction was published in the same editions or corresponding issues of the newpaper or periodical in which said article appeared, and in as conspicuous place and type as was said original article, then the plaintiff in such case shall recover only actual damages."

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 209

CROWELL-COLLIER PUBLISHING COMPANY,
A DELAWARE CORPORATION,

Petitioner,

vs.

MILLARD F. CALDWELL,

Respondent

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

Preliminary Statement

The opinion below, the statement of matters involved, jurisdiction and questions presented appear in the petition for a writ of certiorari herein, and in the interest of brevity are incorporated here by reference.

II

Summary of Argument

Point 1. To constitute an effective protection the constitutional guaranty of freedom of the press and freedom of speech must be applied to all attempts to abridge such

freedom of expression, whether by statutory enactment, summary punishment, by contempt proceedings or by civil actions for libel in which recovery of damages is held to be authorized as a matter of law.

Baumgartner v. *United States of America,* 88 L. Ed. 1525, 322 U. S. 665;
Pennekamp v. *Florida,* 90 L. Ed. 1295, 328 U. S. 331;
Sweeney v. *Caller Times Pub. Co.,* 41 Fed. Supp. 163.

Point 2. It is not libelous to publish erroneous statements of fact and injurious comment or opinion regarding the political conduct and social views of public officials so long as no charge of crime, corruption, gross immorality or gross incompetence is made and no special damage results.

Hills v. *Press Co.,* 202 N. Y. S. 678;
Sweeney v. *Patterson,* 128 F. (2d) 457;
Cotulla v. *Kerr,* 77 Tex. 89, 11 S. W. 1058;
Tanzer v. *Crowley Pub. Corp.,* 268 N. Y. S. 620.

Point 3. The principle decided by the Supreme Court of Florida that a publication is privileged when a person is so situated that it becomes right in the interest of society that he communicate such matter, is applicable to the publication of an article in Collier's magazine concerning the political conduct and views of Florida's Governor on the subject of lynching, a problem of vital interest to society.

Coogler v. *Rhodes,* 38 Fla. 240, 21 So. 109;
Leonard v. *Wilson,* 150 Fla. 503, 8 So. (2d) 12.

Point 4. The doctrine of the Supreme Court of Florida, as stated in *Layne* v. *Tribune Co.,* 108 Fla. 177, 146 So. 234, affording a newspaper publisher protection from an action for libel when publishing a news dispatch originated by a nationally recognized news-gathering agency, is applicable

to a weekly magazine publisher who prints an article previously disseminated throughout the United States by a nationally recognized news-gathering agency.

Point 5. A notice specifying wherein an alleged libelous publication is false, required by Sections 770.01 and 770.02 Florida Statutes, 1941, as a condition precedent to the right to institute an action for libel, is intended for the express purpose of affording the publisher an opportunity to print a retraction and thereby limited recovery to actual damages only. Such requirement is not satisfied by a notice which rejects and refuses retraction and advises the publisher that retraction will not be accepted as satisfaction and that suit has been ordered instituted. The institution of an action for libel predicated on such notice is premature where no special damages are alleged or claimed.

Tademy v. *Scott*, 157 F. (2d) 826.

III

Argument

Point 1

To constitute an effective protection the constitutional guaranty of freedom of the press must be applied to all attempts to abridge the freedom of such expression whether by statutory enactment, summary punishment by contempt proceedings or by civil actions for libel in which recovery of damages are held to be authorized as a matter of law.

The Circuit Court of Appeals has created "new law" repugnant to the Constitution of the United States.

By the decision under review the Circuit Court of Appeals has established new law to the effect that, if by any imputation, words charge that a public official entertains a belief as to a matter of public interest which is condemned

by an appreciable number of respectable people, such words are presumptively actionable.

The decision of the Court deals entirely with imputations. The Court found (R. 36):

> "The imputations here do not appear to be such as would affect the plaintiff as an attorney, if he were now practicing, but they would naturally affect him in his office as Governor."

The law, as established by the Circuit Court of Appeals, and as stated in its opinion, is (R. 36):

> "If the imputations published held the Governor up as indifferent to a lynching in his state, or condoning it, and approving the work of the mob as saving trouble to the courts, they greviously reflect on him in his office and if false and unprivileged are actionable per se, injury and damage being implied."

The finding of the Circuit Court was (R. 36):

> "We have compared the picture made by the editorial with that presented by the public statement by the Governor included in the letter from which an excerpt was quoted. One picture is almost the reverse of the other. The quotation is a correct one in itself, but the letter as a whole shows that so far from condoing the lynching in general or this killing in particular, which the Governor did not think properly to be called a lynching since no mob apparently was involved, he strongly censured the sheriff for stupidity and ineptitude, but did not feel justified in removing him, and warned all officers against any future laxness. It is not necessary that the false charges be made in a direct manner, if the words in their ordinary meaning convey it, and an insinuation is as actionable as a positive assertion, if the meaning is plain (33 Am. Jur. Libel and Slander, Sec. 9)."

Admittedly, the quotation from the respondent's statement that is to be found in the editiorial involved is a correct one. The statement quoted was:

> "The ordeal of bringing a young and innocent victim of rape into open court and subjecting her to detailed cross-examination by defense counsel could easily be as great an injury as the original crime. This fact probably accounts for a number of killings or lynchings which might otherwise be avoided."

To say this was to question the right of one accused of crime—in this instance, Payne—to the "safeguards" of "due process" of law.

The statement was made as a part of what was no more than an evasion of the question of whether the killing of Payne was a lynching.

The statement suggests that the denial of "due process" of law in the case of Payne saved the complaining witness from an "ordeal" of the same magnitude as the original crime of which Payne had been accused.

The statement implies that there was some justification for the punishment inflicted on Payne. This philosophy is contrary to the basic principles of a free society and American government.

Nevertheless, under the new doctrine of the Circuit Court of Appeals, the respondent in his capacity as a public official, is granted immunity from effective criticism.

While the Court has not excluded the defense of truth, it is plain that the nature of the prohibited imputations is such that they would not, in most instances, admit of strict legal proof under common law rules of evidence.

In the field of inference or judgment which is the basis of criticism, there is a borderland which must be unfettered if the right of free speech is to be maintained. This has been

recognized by this Court whenever, and in whatever form the question has arisen.

In *Baumgartner* v. *United States of America*, 88 L. Ed. 1525, 322 U. S. 665, 673-4, it was stated as follows:

> "One of the prerogatives of American citizenship is the right to criticize public men and measures—and that means not only informed and responsible criticism but the freedom to speak foolishly and without moderation."

In the case of *Pennekamp* v. *Florida*, 90 L. Ed. 1295, 328 U. S. 331, Mr. Justice Reed, in delivering the opinion of the Court, stated in part as follows (p. 346):

> "Free discussion of the problems of society is a cardinal principle of Americanism—a principle which all are zealous to preserve * * *."

Mr. Justice Frankfurter, in a concurring opinion, stated in part as follows (p. 354, 357):

> "Without a free press there can be no free society.
>
> * * * * * * *
>
> "* * * The safety of society and the security of the innocent alike depend upon wise and impartial criminal justice. Misuse of its machinery may undermine the safety of the State; its misuse may deprive the individual of all that makes a free man's life dear.
>
> "Criticism therefore must not feel cramped, even criticism of the administration of criminal justice. Weak characters ought not to be judges, and the scope allowed to the press for society's sake may assume that they are not. * * *"

Mr. Justice Murphy, in a concurring opinion, stated in part as follows (p. 369, 370):

> "Were we to sanction the judgment rendered by the court below we would be approving, in effect, an un-

warranted restriction upon the freedom of the press. That freedom covers something more than the right to approve and condone insofar as the judiciary and the judicial processes are concerned. It also includes the right to criticize and disparage, even though the terms be vitriolic, scurrilous or erroneous."

Mr. Justice Rutledge, in a concurring opinion, stated in part as follows (p. 371, 372):

"• • • any standard which would require strict accuracy in reporting legal events factually or in commenting upon them in the press would be an impossible one.

"Unless the courts and judges are to be put above criticism, no such rule can obtain. There must be some room for misstatement of fact, as well as for misjudgment, if the press and others are to function as critical agencies in our democracy concerning courts as for all other instruments of government.

"Courts and judges therefore cannot be put altogether beyond the reach of misrepresentation and misstatement. That is true in any case, but perhaps more obviously where the judiciary is elective, as it is in most of our states, including Florida."

The *Pennekamp* case involved the propriety of contempt proceedings brought against the publisher of articles concerning public acts and views of public officials. Such protection, for "misstatement of fact as well as for misjudgment" which is deemed necessary "if the press and others are to function as critical agencies in our democracy," to be any protection at all must apply to all inroads upon the freedom of such expression, whether in contempt proceedings by the judge affected or in a civil action for damages instituted by a state governor who feels offended.

Obviously, the new law announced by the Circuit Court is an overhanging threat of vast dimensions that is made

more serious by reason of its essential vagueness against the expression of ideas and matters of public concern.

We do not doubt that such a doctrine, if embodied in a statute, would be unconstitutional.

1. A statute which restricts criticism and free discussion of public men and matters of public interest is unconstitutional. *Near* v. *Minnesota,* 208 U. S. 697, 75 L. Ed. 1357.

2. In considering limitations upon the right of free speech, this Court has recognized that the issue presented is not only to be considered in the light of the facts of the case which has arisen, but also in the light of its effect in other cases which may arise. *Thornhill* v. *Alabama,* 84 L. Ed. 1093, 310 U. S. 88; *Hague* v. *C. I. O.,* 83 L. Ed. 1423, 307 U. S. 496.

3. The fact that the issue presented here has arisen in the form of a suit at common law to obtain redress for libel does not mean that a constitutional question can not be raised. It is obvious that through the extension of the law of libel a point may be reached where the freedom of the press is invaded. We believe that the point has been reached in the present case with the establishment of a new doctrine of presumptive liability of words. Unless the relation between libel and free speech is as we have described it, the recent decisions of this Court in the *Pennekamp* case and related cases protecting the right of free speech may be rendered meaningless by the manipulation of the law of libel.

It is now settled that a common law doctrine may be unconstitutional in the same measure as a statute. *American Fed. of Labor* v. *Swing,* 85 L. Ed. 855, 312 U. S. 321. And it has been pointed out that a common law doctrine may involve greater hazards to the Constitution than a statu-

tory rule because necessarily defined with less precision. *Cantwell* v. *Connecticut*, 84 L. Ed. 1213, 310 U. S. 296.

Point II

The Circuit Court of Appeals has decided an important question of law in conflict with the applicable local decisions.

As to the law applicable, the Circuit Court said (R. 35):

> "Publication is averred in Florida and throughout the United States, but the injury must have occurred mainly in Florida where the plaintiff resides and holds office, and the law of Florida is principally to be regarded. We observe, however, no substantial difference between the law of Florida and that of other common law states."

Nevertheless, the decision of the Circuit Court of Appeals in this case is in conflict with the decisions of the Supreme Court of the State of Florida and with the decisions of the State and Federal Courts in other States.

A publication regarding the political conduct and social views of a public official, which does not contain any charge of crime, corruption, gross immorality and gross incompetence, and which does not result in any claim for special damage, is not actionable, even though it may involve misstatements of fact and misjudgment.

In *Layne* v. *Tribune Co.*, 108 Fla. 177, 146 So. 234, the Supreme Court of Florida said:

> "* * * the law of libel cannot be invoked to redress every casual misstatement of fact or every aggravating breach of good morals or manners in newspaper publications."

The United States Circuit Court of Appeals of the District of Columbia established the principle:

> "It is not actionable to publish erroneous and injurious statements of fact and injurious comment or

> opinion regarding the political conduct and views of public officials, so long as no charge of crime, corruption, gross immorality or gross incompetence is made, and no special damage results. Such a publication is not libelous per se."
>
> *Sweeney* v. *Patterson*, 128 F. (2d) 457.

Similarily, in the case of *Tanzer* v. *Crowley Pub. Corporation*, 268 N. Y. S. 620, it was held that criticism of one holding public office:

> "may be captious, ill-timed and without foundation in fact; but outside of a clear charge of corruption or gross incompetence holding one up to disgrace and contumely, there is no libel."

Corpus Juris sets forth the following principle:

> "The interests of society require that immunity should be granted to the discussion of public affairs and that all acts and matters of a public nature may be freely published with fitting comments or strictures. It has been held that fair comment on such matters is a right."
>
> 26 *Corpus Juris*, 1280-1281.

The public official rule derives from the declared policy of the Courts, whenever the question has arisen, that the area of permissible expression should be much broader in the case of public officials than in the case of private citizens. Declarations to that effect are uniform.

Grell v. *Hoard* (Wis.) 239 N. W. 428 (1931);

Hoan v. *Journal Co.*, (Wis.) 298 N. W. 228 (1941);

Bailey v. *Charlestown Mail Association* (W. Va.) 27 S. E. (2d) 837 (1943);

McLung v. *Pulitzer Pub. Co.* (Mo.) 214 S. W. 193 (1919);

Cohalan v. *New York Tribune*, 15 N. Y. S. (2d) 58, 172 Misc. 20 (1939).

The decision of the Circuit Court of Appeals in holding the publication involved in the present action to be libelous *per se* is in conflict with the weight of authority on this subject.

This Court stated the rule to be followed in applying local law in its decision in *Erie Railroad Co.* v. *Tompkins*, 82 L. Ed. 1188, 304 U. S. 64. Since the decision in the *Tompkins* case, this Court has repeatedly declared that asserted conflict of a decision of a Federal Court with applicable local law inherently raises a significant question concerning the interrelations of the judicial systems of the States and the Federal Government. *Wichita Royalty Co.* v. *City National Bank*, 83 L. Ed. 515, 306 U. S. 103, 107; *West* v. *American Tel. & Tel.*, 85 L. Ed. 139, 311 U. S. 223.

This Court has corrected such conflicts many times, recognizing that correction may not safely be left to the accident of subsequent litigation. The authority of the Circuit Court of Appeals, even in a matter of local law, invests its decisions with great importance as precedent throughout the country. In the present case the asserted conflict involves the democratic process itself.

Point III

The principle followed by the Supreme Court of Florida that a publication is privileged when a person is so situated that it becomes right in the interest of society that he communicate such matter, is applicable to the publication of an article in Collier's magazine concerning the political conduct and views of Florida's governor on the subject of lynching, a problem of vital interest to society.

The Supreme Court of Florida, in the case of *Coogler* v. *Rhodes*, 38 Fla. 240, 21 So. 109, adopted the following principle of law:

> "where a person is so situated that it becomes right, in the interests of society, that he should tell to a third

> person certain facts, then, if he bona fide and without malice, does tell them, it is a privileged communication (Townsh. Sland & L. 4th Ed. Sec. 209). This definition is considered more exact in leaving out the word 'duty' because it is privileged in the interests of society for a man to bona fide and without malice say those things which no positive legal duty may make it obligatory upon him to say, id. That the matter stated in accordance with the above definitions with good motives and upon reasons apparently good, should turn out to be untrue, will not render the publisher liable."

The Supreme Court of Florida has confirmed the foregoing rule in quoting with approval from 36 C. J. 1243-4 as follows:

> "the communication may be privileged by reason of either interest or duty; and the duty need not be a legal one; it may be one of imperfect obligation, such as a moral or social one. • • •
>
> "The nature of the duty or interest may be public, personal or private, either legal, judicial, political, moral or social. It need not be one having the force of a legal obligation; it may be one of imperfect obligation. • • •"

Leonard v. *Wilson,* 150 Fla. 503, 8 So. (2d) 12, 14. While the foregoing cases did not involve a newspaper or magazine publication, the principles adopted are not restrictive in their application. See

State v. *Cox* (Mo.), 298 S. W. 837; and
Bailey v. *Charleston Mail Association* (W. Va.) 27 S. E. (2d) 837.

The Florida Supreme Court, in the case of *Layne* v. *Tribune Co., supra,* recognized the public function of newspapers in the present society and their duty to publish timely information. Such court relieved the publisher from liability of such publication not actually originating with the

particular paper in which the news item appeared. This privilege attached by virtue of the social function of the publisher. The Circuit Court of Appeals erred in failing to acknowledge the social function and purpose of Collier's article and in failing to apply the privilege that attached to its publication. Such decision should be reviewed and reversed for its conflict with the principle enunciated in the foregoing Florida decisions and the decisions of sister states generally, which recognize the privilege of such publications.

Point IV

The Supreme Court of Florida, in *Layne* v. *Tribune Co.*, 108 Fla. 177, 146 So. 234, decided that a newspaper publisher was protected from an action for libel when publishing a news dispatch originating in a nationally recognized news-gathering agency. This case involved a false publication that the plaintiff was indicted for violation of the national liquor law. The publication was made in a newspaper of general circulation, being a republication of a news item originated by a national news-gathering agency. Collier's article was a republication of an article in Time Magazine with certain minor changes, the effect of which lessened the harshness of the Time article (condonation was not charged). The fact that Collier's made appropriate criticism and editorial comment based upon the republished news report should not destroy the protection afforded it by the doctrine of *Layne* v. *Tribune Co. supra.* The Circuit Court of Appeals recognized the protection afforded by the above case, but attempted to take the present case out of that holding by asserting that "authorship" by Collier's took the case out of the protective rule so laid down. This conclusion is erroneous because it overlooked the fact that the matters complained of were simply a republication by Collier's from Time Magazine, and therefore, based its decision on a distinction without a difference.

Point V

A notice specifying wherein an alleged libelous publication is false, required by Sections 770.01 and 770.02, Florida Statutes, 1941, as a condition precedent to the right to institute an action for libel, is intended for the express purpose of affording the publisher an opportunity to bring a retraction and thereby to limit the damages recoverable to actual damages. Such requirement is not satisfied by a notice which rejects and refuses retraction and advises the publisher that retraction will not be accepted as satisfaction and that suit has been ordered instituted. Institution of an action for libel under such notice is premature when no special damages are alleged or claimed. Retraction, if made, would have been, in effect, a complete bar to the action instituted by respondent, for no special damages resulted or were alleged, but the respondent in his notice invited the petitioner not to retract, stating that a retraction would not be accepted and that suit would proceed in spite of any retraction. Respondent thus in an abundance of bad faith sought to lull the petitioner into a reliance on respondent's false representation that retraction could not alter the liability of the petitioner, would not be accepted by the respondent in satisfaction, and would have no effect to stop the respondent's action for damages. Thus respondent having no action for special damages sought to keep alive and existing the injury, if any, resulting in general damages, until he could display the same before a jury. But the Legislature of Florida has prescribed that retraction following notice of falsity is a complete cure to injuries which did not result in special damages. Respondent, by his clever maneuvering which misled the petitioner, one thousand miles from Florida, to believe that retraction was neither expected, desired nor would be effective upon the litigation ordered to be instituted, has

failed to give notice contemplated by the Florida Statutes as a jurisdictional prerequisite to the institution of a suit for libel, such required notice being intended for the single purpose of affording the publisher of a newspaper or magazine an opportunity to retract and thereby cure and satisfy what general damage has resulted. The decision sought to be reviewed is in conflict with the statutory law of Florida respecting actions for libel, and is in conflict with the decision of *Tademy* v. *Scott*, 157 Fed. (2d) 826, in which the Fifth Circuit Court held the notice required by such a statute to be jurisdictional and affirmed the judgment of dismissal.

Conclusion

The judgment sought to be reviewed is in conflict with the decisions of this Court, the decisions of other Circuit Courts of Appeal, and in conflict with the decisions of the Supreme Court of Florida. It is repugnant to the constitutional guaranty and should be reviewed by this Court.

WHEREFORE, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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FILE COPY

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1947

No. 209

CROWELL-COLLIER PUBLISHING COMPANY
a Delaware Corporation,
Petitioner,

versus

MILLARD F. CALDWELL,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Opinion delivered by United States Circuit Court of Appeals—Fifth Circuit
See Appendix

I.

JURISDICTION

The jurisdiction of this court was invoked by virtue of Section 240 (a) of the Judicial Code (28 U.S.C. Sec. 347 (a)).

II.

STATEMENT OF THE CASE

Because of the failure of petitioner to set forth in its brief a statement of the case, and the serious omissions of many material facts from the statement contained in its petition for writ of certiorari, we have found it necessary to make a complete statement of the case as set forth below.

On or about the 10th day of October, 1945, one Jesse James Payne, a Negro man under indictment for attempted rape, was placed in the county jail at Madison, Florida, to await trial. On a morning shortly thereafter, the dead body of the said Jesse James Payne was found on the side of a road in Madison County. A grand jury investigation revealed that the deceased had been taken from the unguarded jail in which he was incarcerated, by a person or persons unknown, some time during the night previous to the morning on which his body was found. After being shot to death, Payne's body had been left along the side of the road, where it was later discovered.

On December 28, 1945, Governor Millard Caldwell of Florida, made a written reply to an inquiry by one R. B. Eleazer, of the General Board of Education of Methodist Church, concerning this matter (R. 18). This reply quoted verbatim the press release previously made by Governor Caldwell at the conclusion of the grand jury investigation, in which he severely censured the sheriff of Madison County for his negligence, stupidity and ineptitude in failing to properly protect the prisoner. The Governor further commented that he did not consider the incident a lynching, since an investigation did not indicate that the deceased had been taken from the jail by an individual or by two or more persons acting in concert. The Governor further observed that the ordeal of bringing a young and innocent victim of rape into open court and subjecting her to detailed cross-examination by counsel could easily be as great an injury as the original crime, and speculated that this probably accounts for a number of lynchings or killings which otherwise might be avoided, and that society has not found a solution to this problem (R. 19).

Prior to February 13, 1946, Governor Caldwell learned that the petitioner, Crowell-Collier Publishing Company,

had prepared for publication an editorial to be printed in its February 23, 1946, issue of Collier's magazine, and had distributed to various newspapers throughout the United States advance proofs of such editorial, in an apparent effort to increase the magazine's circulation by calling the attention of the public to the fact that the editorial would be published as aforesaid (R. 6). The editorial states, as a matter of fact, that a Negro in Florida under indictment for attempted rape was snatched from jail by a mob and shot to death; that Governor Millard Caldwell of Florida did not consider this a lynching, but went on to opine that the mob had saved the courts considerable trouble (R. 5). Upon learning of the intention of petitioner to print, publish and distribute said editorial in its February 23d issue of Collier's magazine, the respondent transmitted a telegraphic notice to petitioner on the 13th day of February, 1946, ten days in advance of the publication date referred to, in which he charged that the editorial contained false, libelous and damaging statements, and requested that the advance proofs be withdrawn and that the petitioner refrain from publishing said editorial (R. 6, 7). Despite the warning and admonition from the respondent and his notice in writing of the article he alleged to be false and defamatory, the petitioner proceeded to and did print, publish and distribute throughout the United States, the State of Florida and the Northern District of Florida, the editorial above mentioned, in which it is stated by inescapable inference that the respondent, both individually and as Chief Executive of the State of Florida, condoned the commission of an admittedly unlawful act and approved mob rule, contrary to his oath of office and every conception of good government, law and justice (R. 7). By letter dated February 27, 1946, the respondent again notified the petitioner in writing that the editorial appearing in the February 23d issue of its Collier's magazine was false, defama-

tory and damaging and that suit for the recovery of appropriate damages would be immediately instituted (R. 15). No apology or retraction was published by petitioner prior to the filing of the complaint in this suit on the 20th day of March, 1946 (R. 12), nor has any such apology or retraction since been published (R. 12).

To the complaint the petitioner filed its motion to dismiss (R. 23), which admitted the falsity of the article and which was granted by order of the District Court dated June 14, 1946 (R. 29), on the stated grounds that the complaint does not state a case of libel per se; that no special damages are alleged to support an action of libel per quod, and that the publication is privileged. The respondent, Millard F. Caldwell, took an appeal to the United States Circuit Court of Appeals for the Fifth Circuit, where the order of the District Court was reversed and the cause remanded for further proceedings consistent with the court's opinion (R. 29, 32). For the convenience of the court, the said opinion is herein set out in the appendix. It is this ruling of the United States Circuit Court of Appeals for the Fifth Circuit that the petitioner, Crowell-Collier Publishing Company, seeks to have this honorable court review by a writ of certiorari.

III.

SUMMARY OF ARGUMENT

Point 1. A publication which falsely charges that the Governor of a sovereign state publicly approved the mob lynching of a Negro man charged with attempted rape, by having said that the mob had saved the courts, etc., considerable trouble, exposes such Governor to distrust, hatred, contempt, ridicule and obloquy, and has a tendency to injure him in his office, thereby constituting a libel per se.

BRIGGS v. MERTON & BROWN, 55 Fla. 417, 46 So. 325;
McCLELLAN v. L'ENGLE, 74 Fla. 581, 77 So. 270;
McCRARY v. POST PUBLISHING COMPANY, 109 Fla. 93, 147 So. 259;
TIP-TOP GROCERY COMPANY v. WELLNER, 130 Fla. 270, 177 So. 735.

Point 2. If the direct imputation drawn from a publication holds a Governor up as being indifferent to a lynching in his state, or as condoning it, and as approving the work of a mob as saving trouble for the courts, such publication grievously reflects on him in his office and, if false, is actionable per se, injury and damage being implied. This is so for the reason that, as Governor, he took an oath of office to uphold the constitution of his state, which requires that he see that the laws are faithfully executed, which laws guarantee to every person accused of crime a speedy and public trial by impartial jury and subjects the Governor to impeachment for the commission of a misdemeanor in office.

STATE v. BROWSKY, 11 Nev. 119;
STATE v. HASTINGS, 38 Neb. 584, 56 N. W. 774.

Point 3. The language of a publication should be construed as the common mind would naturally understand it, and it is not necessary that the false charge be made in a direct manner, if the words in their ordinary meaning convey it. An insinuation is as actionable as a positive assertion, if the meaning is plain.

33 AMER. JURIS.—Libel and Slander, Par. 9;
McCLELLAN v. L'ENGLE, 74 Fla. 581, 77 So. 270.

Point 4. Although fair and honest criticism of the conduct of a public officer is not libelous, the mere fact that he

is a public officer does not constitute a warrant to spread false charges against him of criminal acts or disgraceful conduct, and the qualified privilege extended to publications does not protect a false statement of fact or an unjustifiable inference. The privilege ends when falsity begins.

NEVADA STATE JOURNAL PUBLISHING CO. v. HENDERSON, (1923; C.C.A. 9th) 294 Fed. 60, 264 U. S. 591, 68 L. Ed. 865, 44 Sup. Ct. 404;
CORTRIGHT v. ANDERSON (1924), 208 App. Div. 1, 202 N.Y.S. 729;
JONES, VARNUM & COMPANY v. TOWNSEND, 21 Fla. 431, 58 Am. Rep. 676;
GRAHAM v. STAR PUBLISHING COMPANY (1925), 133 Wash. 387, 233 Pac. 225.

Point 5. Where a complaint properly alleges malice in fact in connection with a false publication, the question of privilege becomes immaterial, as it is no excuse for malice.

ABRAHAM v. BALDWIN, 52 Fla. 151, 42 So. 591;
COOGLER v. RHODES, 38 Fla. 240, 21 So. 109.

Point 6. The rule which protects a newspaper against liability for false statements contained in an Associated Press or wire service dispatch published by it, does not apply to a deliberate magazine editorial containing false, damaging and libelous statements made on the editor's own responsibility, particularly when the editor is notified ten days in advance of the date on which the publication is made, that such editorial is false and a request to not publish the same is made.

LAYNE v. TRIBUNE COMPANY, 108 Fla. 177, 146 So. 234.

Point 7. Section 770.02 of the Florida Statutes, permitting a defendant in an action of libel to avoid liability for punitive damages by publishing a correction, apology or retraction, was enacted for the benefit of the publisher of any alleged libel, and he cannot escape liability for punitive damages, after failing to publish an apology or retraction, on the excuse that the person libeled stated in his second written notice that he would not accept an apology or retraction as satisfaction for the damages suffered.

METROPOLIS COMPANY v. CROASDALE, 145 Fla. 455, 199 So. 568.

IV.

ARGUMENT

POINT 1

The publication complained about stated in part as follows:

> "In Florida a few months ago, a Negro under indictment for attempted rape was snatched from jail by a mob and shot to death. Governor Millard Caldwell of Florida said he didn't consider this a lynching. *He went on to opine that the mob had saved courts, etc., considerable trouble* * * * "
>
> (Italics supplied)

(R.5). The above quoted statement purports to be a direct quotation from a statement made by Governor Caldwell of Florida, and is wholly false in every respect, which falsity is admitted by petitioner's motion to dismiss, the order on which is here for review. The statement implies that the Governor holds Payne's death at the hands of a mob was justified, in view of the crime he is alleged to have

committed, which philosophy is contrary to every concept of justice and democratic government. Such statement, if believed, would create within the mind of an average man hatred, contempt and ridicule of Governor Caldwell. Embodied, as it is, in an editorial which lauds and praises the Governor of another southern state for his action in dealing with a similar social problem (R. 5), it can have no effect other than to injure Governor Caldwell in his office.

In holding that such publication is libelous per se, the Circuit Court of Appeals for the Fifth Circuit followed the rule expressed many times by the Supreme Court of Florida.

In the case of McCLELLAN v. L'ENGLE, 74 Fla. 581, 77 So. 270, a member of the United States House of Representatives sued for libel on account of a newspaper publication in which the plaintiff was depicted as a clown and grandstand player, and in which it was said that he had done nothing for Florida since he was sent to Washington and was unable to vote intelligently in a House caucus. In applying the law to the publication complained of, the court said:

> "(1) A civil action for libel will lie when there has been a false and unprivileged publication which exposes a person to distrust, hatred, contempt, ridicule, or obloquy, or which causes such person to be avoided, or which has a tendency to injure such person in his office, occupation, business, or employment. If the publication is false and not privileged, and is such that its natural and proximate consequence necessarily causes injury to a person in his personal, social, official, or business relations of life, wrong and injury are presumed or implied and such publication is actionable per se. * * *

"(2) The language of a publication alleged to be libelous should be construed as the common mind would naturally understand it. Jones, Varnum & Co. v. Townsend's Administratrix, 21 Fla. 431, 58 Am. Rep. 676.

" * * * 'A libelous publication falsely and maliciously made is not privileged. The protection of the privilege may be lost by the manner of its exercise, though the belief in the truth of the charge exist.' Jones, Varnum & Co. v. Townsend's Administratrix, 21 Fla. 431, text. 456, 58 Am. Rep. 676; Abraham v. Baldwin, 52 Fla. 151, 42 South. 591, 10 L.R.A. (N.S.) 1051, 10 Ann. Cas. 1148."

In the case of METROPOLIS COMPANY v. CROASDALE, 145 Fla. 455, 199 So. 568, a public official sued in libel on account of a publication charging that he had been "cashiered" out of his job with the county of his residence. In holding that the effect of the publication was to charge *by imputation* that the plaintiff had been dismissed from his job with dishonor or in disgrace, and that the publication was, therefore libelous, the Supreme Court of Florida said:

> "Libel per se is false and unprivileged publication of unfounded statements which tend to injure a person in office, occupation, business, or employment and which in natural and proximate consequence will necessarily cause injury. * * * "

To the same effect are the rulings of the Supreme Court of Florida, in the cases of BRIGGS v. MERTON & BROWN, 55 Fla. 417, 46 So. 325; McCRARY v. POST PUBLISHING COMPANY, 109 Fla. 93, 147 So. 259; TIP-TOP GROCERY COMPANY v. WELLNER, 130 Fla. 270, 177 So. 735; LAND v. TAMPA TIMES PUBLISHING COMPANY, 68 Fla. 546, 67 So. 130.

The case of PENNYKAMP v. FLORIDA, 90 L. Ed. 1295, 328 U. S. 331, involved a conviction on a citation for contempt of court. Petitioner has quoted freely from this case, using the language expressed therein as justification for the libel committed against the respondent. Such language, however, was used by this court in deciding one issue, and one issue alone, namely: "whether or not the publication complained of presented a clear and present danger of high imminence to the administration of justice by the court or judges who were criticized." Although this court held that the publication complained of did not constitute a clear and present danger of high imminence to the administration of justice, when construed in the light of the constitutional provision relied upon, it did hold:

> "Here there is only criticism of judicial action already taken, although the cases were still pending on other points or might be revived by rehearings. For such injuries, when the statements amount to defamation, a judge has such remedy in damages for libel as do other public servants."

This court, therefore, recognized that, although false statements criticizing public officials and holding them up to ridicule, contempt, disgrace and obloquy, might not be sufficient to sustain a conviction of contempt of court, the person injured still has his remedy in a suit of libel for damages against the author of the libelous publication.

POINT 2

The editorial complained about (R. 5), when read in its entirety, was calculated to depict Governor Caldwell as representing that type of backward and discredited Southern official who has no regard for minority races, nor a desire to see that they receive the full protection of the law. The inescapable imputations and inferences naturally

drawn from the publication hold the Governor up as indifferent to a lynching in his state, or condoning it, and as having approved the work of the mob as saving the courts trouble.

The Florida Constitution, Section 6, Article IV, imposes upon the Governor the sworn duty of seeing that the laws are faithfully executed.

Section 11 of the Declaration of Rights, contained in the Florida Constitution, guarantees to every person accused of a crime the right to a speedy and impartial trial by an impartial jury.

Section 29, Article III, of the Constitution of Florida, provides that the Governor shall be liable to impeachment for any misdemeanor in office.

The use of the phrase, "misdemeanor in office," contained in the above mentioned section of the Florida Constitution, used in its proper sense, means "misconduct" and does not necessarily refer to a technical misdemeanor, which is a species of crime.

STATE v. HASTINGS, 38 Neb. 584, 55 N. W. 774;
STATE v. BROWSKY, 11 Nev. 119.

If it were true that the Governor had in fact condoned a mob lynching and approved the work of a mob, in killing a man who had merely been accused of committing a crime, under the pretext that such killing had saved the courts trouble, he would certainly be guilty of misconduct or a misdemeanor in office and subject to impeachment by the proper forum of government.

In the case of COTULLA v. KERR, 74 Tex. 89, 11 S. W.

1058, 15 Am. St. Rep. 819, the Supreme Court of Texas said that if a libelous publication applies to a person as an officer, the better opinion seems to be that, to make it actionable per se, the charge must be of such nature which, if true, would be cause for his removal from office. Further commenting, the court said:

"Thus, the erection and display of a large signboard warning people against passing through a certain county, since the district attorney (who was entitled to certain fees upon conviction of persons of penal offenses) was a 'fee grabber' was held, in Smith v. Pure Oil Co. (1939) 278 Ky. 430, 128 S. W. (2d) 931, to be libelous per se, if false, and so not privileged.

"Thus, a direct charge of official misconduct is not comment or criticism, and, if the charge is false, is not privileged. Lindsey v. Evening Journal Asso. (1932) 10 N. J. Mis. R. 1275, 153 A. 245, holding that a publication that plaintiff (employed as a clerk in the county board of elections) was caught in the act of disfranchising the voters of a certain city because they did not bow the knees to a named individual was not a mere comment or criticism, but a direct charge of a particular act of misconduct, and, if not true, would not be privileged even if made without malice. The court declared: 'There is no doubt that the public acts of a public man may lawfully be made the subject of fair comment or criticism, not only by the press but by all members of the public. But the distinction cannot be too clearly borne in mind between comment and criticism, and allegations of fact, such as that disgraceful acts have been committed or discreditable language used. It is one thing to comment upon or criticize, even with severity, the acknowledged or proven acts of a public man, and quite another to assert that he has been guilty of particular acts of misconduct. It is settled that newspapers as such have no peculiar privilege, and it is equally settled that the privilege of comment and criticism on matters of public interest does not extend to false statements.'

"An article in the defendant's newspaper reciting that there had been a severe storm in a certain vicinity, that it was the duty of the members of the levee board to take necessary steps for the protection of persons and property in that vicinity, that notwithstanding this, members of the board were derelict in their duty, failing to act in the emergency, and that the plaintiff, one of the members of the board, had left the scene of danger, with his family, and gone to New Orleans, was held, in Cadro v. Plaquemines Gazette (1942) 202 La. 1, 11 So. (2) 10, to be of a defamatory nature, and it was further held that if the statements were untrue, the doctrine of privilege or fair comment was inapplicable."

It cannot be doubted but that the statements contained in the publication of the petitioner, if true, would warrant the respondent's impeachment.

POINT 3

Petitioner attempts to take refuge in the position that the words used in the editorial complained about could be considered libelous only by implication or imputation, and not as a result of any direct charge of misconduct against the respondent. This position is not sustained by the record. However, in considering whether or not the publication is libelous per se, the language must be construed as the common mind would naturally understand it. It is not necessary that the admittedly false charge be made in a direct manner if the words in their ordinary meaning convey the imputation of misconduct in office. An insinuation is as actionable as a positive assertion, if the meaning is plain. The inescapable conclusion reached by the average mind of a person reading the editorial complained about, both from direct statements made and by imputations and inferences drawn from such statements, is that Governor Caldwell condoned the mob lynching of a Negro man charged with rape and expressed the conviction that the

lynching had saved the courts of Florida considerable trouble. The admitted utter falsity of the statements contained in the editorial, as well as the imputations and implications drawn therefrom, was ably expressed by Judge Samuel Sibley, of the Court of Appeals, in this case, (Appendix 28), when he said:

> "We have compared the picture made by the editorial (R. 5) with that presented by the public statement by the Governor included in the letter from which an excerpt was quoted. (R. 8). One picture is almost the reverse of the other. The quotation is a correct one in itself, but the letter as a whole shows that so far from condoning lynching in general or this killing in particular which the Governor did not think properly to be called a lynching since no mob apparently was involved, he strongly censured the sheriff for stupidity and ineptitude, but did not feel justified in removing him, and warned all officers against any future laxness. * * * "
>
> (Parentheses supplied)

33 Am. Juris.—Libel and Slander, Par. 9
McCLELLAN v. L'ENGLE, 74 Fla. 581, 77 So. 270.

POINT 4

We subscribe to the doctrine that in our form of democracy, freedom of speech and freedom of the press must be accorded the full right to fairly and honestly criticize the conduct of public officers. To do otherwise would promote corruption and bad government. So long as the statements made are true, the official record and statements of public officials may be criticized and condemned. Freedom of speech and freedom of the press, however, cannot be used as an effective cloak against liability for false statements or perverted facts attributed to public officials, nor do they protect against unjustifiable inferences. The qualified privilege accorded newspapers and magazines in comment-

ing upon the acts, statements and records of public officials ends where falsity begins.

In the case of NEVADA STATE JOURNAL PUBLISHING COMPANY v. HENDERSON, 294 Fed. 60, the Circuit Court of Appeals for the Ninth Circuit, correctly stated the law of libel to be as follows:

> "The publication of defamatory matter admittedly false, without inquiry or investigation to ascertain the truth of the charges before publication, and the refusal to retract after publication, held to warrant a finding of actual malice, and the imposition of exemplary damages by the jury. Privilege does not extend to publication of untrue statements of fact. Privilege in publications respecting a candidate for public office does not extend to the making of untrue statements of facts, or false charges of particular acts of criminality or disgraceful conduct."

The original Florida case on the question of privilege is JONES, VARNUM & COMPANY v. TOWNSEND'S ADMINISTRATRIX, 21 Fla. 431, 58 Am. Rep. 676. In this decision the court quoted with approval the law announced by the Supreme Court of the State of New York as follows:

> "In Hamilton v. Eno, 81 N. Y. 116, it is held that the official acts of a public functionary may be fully criticized and entire freedom of expression used in argument, sarcasm and ridicule upon the act itself, and that the occasion will excuse everything but actual malice and evil purpose in the critic; *but the occasion will not of itself excuse an attack upon the character and motive of the officer;* to excuse this the critic must show the truth of what he has uttered. To accuse one holding a public office of an offense is not privileged, and if the charge be false the utterer is liable, however good his motives, and this although the libel relate to

an act of the officer in discharge of his official duties."
(Italics supplied)

In the case of LEVERT v. DAILY STATES PUBLISHING COMPANY (1909), 123 La. 594, 49 So. 206, 23 L.R.A. (N.S.) 726, the Supreme Court of Louisiana said:

> "The privilege of fair and reasonable criticism of public men does not embrace the right to publish false statements of fact, or to falsely impute to them malfeasance or misconduct in office; *malice is conclusively established if the communications are false in fact.*"
> (Italics supplied)

To the same effect is WHEATON v. BEECHER (1887), 56 Mich. 307, 33 N. W. 503:

> "One may in good faith publish the truth concerning a public officer, but if what is stated is false or aspersive, he who publishes it is liable therefor, however good his motives."

In publishing the editorial complained of (R. 5), the publisher transcended the borders of fair and honest criticism of the respondent. It is common knowledge that the respondent Governor took an oath to faithfully execute the laws of his state, which guarantee to every person accused of crime a fair, speedy and impartial trial. The editorial complained about states, in effect, that the respondent had condoned the mob lynching of a man accused of crime for which he had not yet been tried. The conclusive inference is that the respondent thereby violated his oath of office and closed his eyes to a direct violation of the laws which he is sworn to faithfully execute. Such a statement of fact by petitioner, which is utterly false, cannot be considered privileged merely because the victim of the libel is a public official.

CORTRIGHT v. ANDERSON, 208 App. Div. 1, 202 N. Y. S. 729;
GRAHAM v. STAR PUBLISHING COMPANY (1925), 133 Wash. 387, 233 Pac. 225.

POINT 5

Petitioner attempts to excuse itself from liability for the false and libelous publication complained about on the ground that the statements come within the qualified privilege rule. Such rule of law has no application here, for the reason that express malice is alleged in the complaint in connection with the false publication complained about (R. 8, 12). Where express malice is alleged, privilege becomes immaterial, since privilege is no excuse for malice.

COOGLER v. RHODES, 38 Fla. 240, 21 So. 109;
ABRAHAM v. BALDWIN, 52 Fla. 151, 42 So. 591.

POINT 6

We recognize the rule stated by the Supreme Court of Florida, in the case of LAYNE v. TRIBUNE COMPANY, 108 Fla. 177, 146 So. 234, which protects a newspaper against liability for false statements contained in an Associated Press or a wire service dispatch published by it. The reason for this rule is obvious, and is fully explained by the court in its opinion. The editing and publishing of a daily newspaper does not permit verification of news dispatches emanating from different points over the world before publishing such dispatches in the newspaper.

This rule, however, has no application to the facts in this case. The publication complained about here is a deliberate magazine editorial containing false, damaging and libelous statements made on the editor's own responsibility. It was published in a weekly magazine where the time element to meet a publication date was not involved.

The record shows (R. 6) that due notice of the falsity of the statements contained in the editorial was communicated to the officials of the petitioner ten days before the date on which the article was published. Ample time was afforded to verify the incorrectness of the statements and to withhold the editorial if the petitioner had desired to do so. The reason for the rule in the LAYNE v. TRIBUNE COMPANY case, supra, is not present here, and the law stated by the court has no application to this case.

Petitioner seeks to excuse its libelous act on the ground that it was reprinting an article taken from Time Magazine, a recognized news-gathering agency. If the petitioner was justified in plagiarizing the Time article (R. 9, 10) which was published on January 7, 1946, Time Magazine admitted the incorrectness of its article and apologized (R. 10, 11). Such apology was made almost three weeks before the publication of the editorial complained about for which this suit was instituted. The court will judicially notice, however, that Time Magazine is not a news-gathering agency, but a copyrighted publication. Collier's not only did not have the right to lift the news story from it without the permission of Time, but it is confronted with the obvious proposition that Time Magazine is a news perodical that is distributed directly to the public, not to other publishers for republication. This is a matter of common knowledge, and if the court will examine any copy of Time Magazine, it will find this language:

> "Copyright. Time is Copyright in . . . . . , by TIME, INC. under International Copyright Convention. All Rights reserved under Pan American Copyright Convention.
>
> "The Associated Press is exclusively entitled to the use for republication of the local telegraphic and cable news published herein originated by Time, The Weekly

Newsmagazine or obtained from The Associated Press."

Thus Collier's has demonstrated not to have had the right in the first instance to take the news story from Time and quote it practically verbatim.

POINT 7

The record shows that the respondent served on the petitioner, ten days before publication of the article complained of (R. 16), and again served notice on petitioner, more than five days before the institution of this suit in the District Court, a notice in writing, specifying the article and the statement therein, which he alleged to be false and defamatory (R. 15). Each notice fully complied with all the requirements of Section 770.01, Florida Statutes, 1941, which provides as follows:

> "770.01. Notice condition precedent to action or prosecution for libel.
>
> "Before any civil action is brought for publication, in a newspaper or periodical, of a libel, the plaintiff shall, at least five days before instituting such action, serve notice in writing on defendant, specifying the article, and the statements therein, which he alleges to be false and defamatory."

If the petitioner had sought to avoid responsibility for punitive or exemplary damages, it was its privilege to do so, by publishing a correction, apology or retraction, in conformity with the requirements of Section 770.02, Florida Statutes, 1941, which reads as follows:

> "770.02. Correction, apology or retraction by newspaper.
>
> "If it appears upon the trial that said article was

published in good faith, that its falsity was due to an honest mistake of the facts, and that there were reasonable grounds for believing that the statements in said article were true, and that within ten days after the service of said notice a full and fair correction, apology and retraction was published in the same editions or corresponding issues of the newspaper or periodical in which said article appeared, and in as conspicuous place and type as was said original article, then the plaintiff in such case shall recover only actual damages."

The record shows that no correction, retraction, or apology was published by the petitioner within the time required by law, nor has one since been published (R. 12).

Petitioner now seeks to avoid the responsibility for punitive damages under the pretext and excuse that it was relieved from this requirement by the statement made in respondent's second notice, in which respondent said that he could not accept a retraction or apology as satisfaction for the damages suffered (R. 23).

The first notice sent petitioner on February 13, 1946, ten days before the article was published, complied with all requirements of the applicable statute relative to notice. No contention is made by petitioner that this notice was insufficient. Nor is it contended that such notice contained any statements which would relieve petitioner from liability for punitive damages. Therefore, whether or not the second notice sent petitioner on February 27, 1946, was sufficient, becomes immaterial.

The statute permitting the publication of a retraction or an apology in avoidance of punitive damages was enacted for the sole use and benefit of the person publishing the libel. It was his privilege and right to take advantage

of the benefits conferred by said statute by publishing such apology or retraction, if he saw fit so to do. The statement by respondent in his second notice, that he would not accept a retraction or apology as satisfaction of the damages suffered, was not binding in any respect upon petitioner. It would have been fully within its rights to disregard such statement and protect itself against the imposition of punitive damages, if it had elected to do so. Petitioner elected, however, to stand upon its position that no libel had been committed through the publication of the editorial complained about, thereby running the risk of suffering the imposition of punitive damages in the event it was held that such editorial was in fact libelous and punitive damages were awarded. Petitioner cannot now be heard to complain that punitive damages should not be recovered merely because the respondent stated in his second notice that he would not accept an apology or retraction in satisfaction of the damages suffered. The purpose of the statute above mentioned, and the manner in which it was intended to operate in cases of this kind, was discussed by the Supreme Court of Florida, in the case of METROPOLIS COMPANY v. CROASDALE, 145 Fla. 455, 199 So. 568. There it was held that failure of a newspaper to print a retraction of a libelous article within ten days after receipt of statutory notice, is evidence of actual malice, which subjected the newspaper to the imposition of punitive damages. It is, therefore, mandatory upon the one publishing the libel likewise to publish a retraction within the statutory period, or else subject itself to the payment of punitive damages.

We submit that no further consideration of this question is necessary, because the record shows a strict compliance with the statute. However, if the court cares to examine the matter further, we submit that the statute itself is unconstitutional.

HALE AND BENSON, LAW OF THE PRESS, p. 69; Sections 1 and 4, DECLARATION OF RIGHTS, FLORIDA CONSTITUTION.

CONCLUSION

The judgment sought to be reviewed is in complete harmony and conforms with the decisions of this court, the decisions of other Circuit Courts of Appeal, and with the decisions of the Supreme Court of Florida. The Circuit Court of Appeals correctly applied the applicable law to the facts shown by the record to exist in this case, in holding that the complaint stated a case of libel per se, for which damages are recoverable.

WHEREFORE, it is respectfully submitted that the petition for a writ of certiorari filed herein should be denied.

Respectfully submitted,

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APPENDIX

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 11798

MILLARD F. CALDWELL,
Appellant,

-vs-

CROWELL-COLLIER
PUBLISHING COMPANY,
Appellee.

Appeal from the District Court of the United States for the Northern District of Florida.
(April 21, 1947)

Before SIBLEY and LEE, Circuit Judges, and STRUM, District Judge.

SIBLEY, Circuit Judge: The appellant Millard F. Caldwell, a citizen of Florida, sued appellee Crowell-Collier Publishing Company, a corporation of Delaware, for a sum largely exceeding $3,000.00 for an alleged libel published Feb. 23, 1946, in the magazine called "Colliers" which was circulated throughout the State of Florida, the United States, and the world. The complaint was dismissed on motion, the district judge holding that it did not state a case of libel per se, that no special damages were alleged to sustain it as a libel per quod, and that it appeared that the publication complained of was privileged, The plaintiff appeals to this court.

The allegations, much condensed, are that Caldwell was and is the Governor of the State of Florida, that the publication complained of is an editorial as follows:

"Two Governors on Race Problems."

"About a year ago a fourteen year old negro broke into a Wilmington, North Carolina, house, raped a pregnant woman, was caught the next day, confessed, and was sentenced to death. Recently Governor Cherry of North Carolina commuted the colored boy to life imprisonment, remarking in part: 'The crimes are revolting, but a part of the blame arises from the neglect of the State and society to provide a better environment. . . . ' "

"In Florida a few months ago, a negro under indictment for attempted rape was snatched from jail by a mob and shot to death. Governor Millard Caldwell of Florida said he did not consider this a lynching. He went on to opine that the mob had saved courts, etc., considerable trouble, and added:

'The ordeal of bringing a young and innocent victim of rape into open court and subjecting her to detailed cross-examination could easily be as great an injury as the original crime. This fact probably accounts for a number of killings which might otherwise be avoided.'

"Thus Cherry of North Carolina expresses the forward-looking view of these matters, while Caldwell of Florida expresses the old narrow view which has been about as harmful to southern white people as to southern negroes. We can only congratulate North Carolina on its governor and hope that Florida may have similar gubernatorial good luck before long."

Further allegations are that it was not true that the negro was snatched from jail by a mob; that the statement that the Governor said he did not consider this a lynching was a distortion, imputing that the Governor did not disapprove the killing, while what he said was that it was murder, and not a lynching because there was no evidence of mob action; and that he "opined the mob had saved the courts considerable trouble" was wholly untrue; the direct

quotation was an isolated excerpt from a letter, the whole letter being exhibited, which quoted a public statement that a grand jury had investigated the killing, had failed to fix the guilt, but exonerated the sheriff; that the Governor had sent a special investigator who reported the sheriff did not participate in the crime; that the Governor thought nevertheless the sheriff by his stupidity and ineptitude had showed his unfitness for office, but he was duly elected by the people of the county and not subject to removal for this cause by the Governor, but the Governor now served notice on the officials of Florida that the highest degree of care would be expected; there followed an expression in the letter of the writer's personal opinion that the killing was not a lynching; and the reference to the ordeal of a trial as respects the young victim (said to have been a child of five years); and an expression of determination to awaken the citizens of the counties to feel responsible for the officials they elect; and an intention to stimulate the people to action and make democracy work.

Further allegations are that on February 13, 1946, the plaintiff learned of the editorial about to be printed, and he telegraphed the publisher, the editor, and the managing editor, calling attention to the false statements and inferences in the editorial and the damage it would do him, and requesting that it be not published, but nevertheless it was wickedly and maliciously published, intended to and having the effect of injuring him in his good name, fame, and creed, and bringing him into contempt and ridicule before the people of Florida and the United States. It is alleged that plaintiff was before his election as Governor a practicing attorney at law in general practice, that he had been active in politics, serving in the Legislature of Florida and in the Congress of the United States, that the editorial gave the impression that a lynching had occurred

in Florida while he was Governor, and that he had condoned it, and had approved the action of a mob in taking a negro from the protection of the law and killing him, to the great damage of the plaintiff's reputation both personal and professional, and that it was done for the purpose of casting contempt and ridicule upon plaintiff and discrediting him in the eyes of the public and the electorate, and that the editorial was calculated to create the impression that he had condoned and approved lax law enforcement and lynch law.

Lastly it is alleged that more than five days before suing plaintiff had in writing pointed out to defendant the editorial and the statements therein considered false and defamatory, and stated his intention to sue, as required by Florida statute, but no apology, retraction or correction has been made.

We think a case of libel is alleged. Publication is averred in Florida and throughout the United States, but the injury must have occurred mainly in Florida where the plaintiff resides and holds office, and the law of Florida is principally to be regarded. We observe, however, no substantial difference between the law of Florida and that of other common law States. A libel is a compound of written falsity and malicious publication, but the falsity may consist in untrue imputation as well as direct statement, and malice may be inferred from the nature of the charges made as well as from the circumstances. False imputations may be actionable per se, that is in themselves, or per quod, that is on allegation and proof of special damage. 33 Am. Jur., Libel and Slander, §5; Commander v. Pederson, 116 Fla. 148, 156 So. 337; Johnson v. Finance Acceptance Co., 118 Fla. 397, 159 So. 364. No special monetary or other damage is here alleged, so the question is, Are the false imputations libelous per se? Imputation of a

crime is not present. But it is enough, if the natural or necessary result of the imputation is to hold one up to public hatred, contempt or ridicule, 33 Am. Jur., Libel and Slander, §45; or to prejudice him in his profession, office, occupation or employment, Id. §63, and more particularly in his public office, §79. In Briggs v. Merton and Brown, 55 Fla. 417, 46 So. 325, the law is thus stated:

> "A civil action will lie when there has been a false and unprivileged publication by letter or otherwise which exposes a person to distrust, hatred, contempt, ridicule, or obloquy, or which has a tendency to injure such person in his office, occupation, business or employment. If the publication is false and not privileged, and is such that its natural and proximate consequence necessarily causes injury to a person in his personal, social, official, or business relations of life, wrong or injury are presumed and implied and such publication is actionable per se."

This is repeated in Land v. Tampa Times Pub. Co., 68 Fla. 546, 67 So. 130; McClelland v. L'Engle, 74 Fla. 581, 77 So. 270; McCrary v. Post Pub. Co., 109 Fla. 93, 147 So. 259; Tip Top Gro. Co., v. Wellner, ... Fla. ....., 199 So. 568. The imputations here do not appear to be such as would affect the plaintiff as an attorney, if he were now practicing, but they would naturally affect him in his office as Governor. The Florida Constitution, Art. IV, Sect. 6, imposes on the Governor the sworn duty of seeing that the laws are faithfully executed. Art. XVI, Sect. 2, prescribes the form of oath. The Declaration of Rights, Sect. 11, guarantees to every person accused of crime a speedy and public trial by an impartial jury. Art. III, Sect. 29, makes the Governor subject to impeachment for "misdemeanor in office". Misdemeanor in the constitutional sense means simply misconduct, not necessarily indictable. State v. Browsky, 11 Nev. 119; State v. Hast-

ings, 38 Neb. 584, 56 N. W. 774. If the imputations published hold the Governor up as indifferent to a lynching in his State, or condoning it, and approving the work of the mob as saving trouble to the courts, they greviously reflect on him in his office, and if false and unprivileged are actionable per se, injury and damage being implied.

We have compared the picture made by the editorial with that presented by the public statement by the Governor included in the letter from which an excerpt was quoted. One picture is almost the reverse of the other. The quotation is a correct one in itself, but the letter as a whole shows that so far from condoning lynching in general or this killing in particular which the Governor did not think properly to be called a lynching since no mob apparently was involved, he strongly censured the sheriff for stupidity and ineptitude, but did not feel justified in removing him, and warned all officers against any future laxness. It is not necessary that the false charge be made in a direct manner, if the words in their ordinary meaning convey it, and an insinuation is as actionable as a positive assertion if the meaning is plain. 33 Am. Jur., Libel and Slander §9. A jury might well conclude that the Governor was being held up as unfaithful to his office by reason of facts falsely stated and implied in the editorial.

But it is argued by appellee that what "Colliers" published is a substantial reproduction of what it is alleged the magazine "Time" had said in its issue of Jan. 7, and that a newspaper may reproduce without liability news from a reliable source which cannot well be verified. Layne v. Tribune Co., 108 Fla. 177, 146 So. 234. The Layne case had to do with an Associated Press news item in a daily paper. Here we have a deliberate magazine editorial, made on the editor's own responsibility. If he relied on "Time",

it is also alleged that "Time", when its attention was called to the incorrectness of its publication, had on Feb. 4 published a full retraction and apology, of which the editor of "Colliers" could easily have known.

More broadly, it is argued that since the publication related to a public officer and was by the public press, there is a qualified privilege which excuses it. Free speech and free press are an established part of our democratic institutions, but both are limited by the law of slander and libel. By word and by pen the official record and pronouncements of a public man may be discussed and criticised, condemned and even vituperated, but the facts cannot be perverted with impunity. Several of the Florida cases above cited were between public officers and newspapers. An earlier one is Jones Varnum and Co. v. Townsend, 21 Fla. 431. See also Nevada State Journal Co. v. Henderson, 294 Fed. 60. But we need not at present further discuss this asserted privilege because the complaint alleges malice in fact, and privilege is never an effective cloak for malice. Abraham v. Baldwin, 52 Fla. 151, 42 So. 591; Coogler v. Rhodes, 38 Fla. 240, 21 So. 109. This allegation is supported, too, by the alleged fact that attention was called to the falsity of the intended publication but it was proceeded with. Also under the Florida statute notice of the intended suit was given so that a retraction might be made to limit damages to actual loss, if any, but no retraction was made. See Metropolis v. Croasdell, supra. Privilege and want of malice should await final decision on the trial.

The judgment is reversed and the cause is remanded for further consistent proceedings.

REVERSED.